

HARYADI DADEH**a****v.****PP**

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
MOHAMED DZAIDDIN FCJ
ABDUL MALEK AHMAD FCJ
[CRIMINAL APPEAL NO: 05-12-1998(B)]
22 JUNE 2000

b

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drug - Section 37(da) - Presumption of trafficking - Whether may be invoked based on presumption of possession under s. 37(d) - Whether presumption of trafficking may only be invoked based on a finding of actual possession - Consequence of doubt as to whether invocation of presumption of trafficking was based on finding of actual possession or on statutory presumption of possession*

c**d**

This was an appeal from the decision of the Court of Appeal affirming the decision of the High Court convicting the appellant under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death for trafficking in 251.06g of cannabis. The Court of Appeal had held that the trial judge was justified in concluding that the appellant had possession of the cannabis and hence was correct in invoking the presumption of trafficking under s. 37(da) of the Act against him. Before the instant court, the appellant submitted that the trial judge had erred in invoking the presumption of trafficking (s. 37(da)) based on the statutory presumption of possession (s. 37(d)) which he had earlier invoked based on his finding that the appellant had custody and control of the cannabis. It was argued that the presumption of trafficking (s. 37(da)) could not be invoked in the absence of an express and affirmative factual finding of actual possession.

e**f****g****Held:****Per Chong Siew Fai CJ (Sabah & Sarawak)****h**

[1a] The presumption of possession under s. 37(d) of the Act cannot be relied upon to further invoke the presumption of trafficking under s. 37(da) of the Act.

i

- a** [1b] It would have been right and proper if the trial judge had invoked the presumption of trafficking under s. 37(da) of the Act based on his **finding** that the appellant had **actual** possession of the cannabis, if at all he did earlier make such an express factual finding. However, it appeared that the trial judge had also found the appellant having custody and control of the cannabis and, based on that finding, invoked the presumption of possession (s.37(d)) against him. And, based on this statutory presumption of possession (s. 37(d)), the trial judge invoked the presumption of trafficking (s. 37(da)) against the appellant.
- b**
- c** [1c] The trial judge had seriously misdirected himself when he made a finding of actual possession and, at the same time, invoked the statutory presumption of possession under s. 37(d) of the Act. There was grave doubt as to whether he had indeed made a finding of actual possession or was relying on the statutory presumption of possession (s. 37(d)), and as to which of the two
- d** the invocation of the presumption of trafficking (s.37(da)) against the appellant was based upon.

[Appeal allowed; conviction quashed and death sentence set aside; substituted therefor conviction under s. 6 of the Act and 10 years' imprisonment plus 10 strokes of the rotan.]

e

[Bahasa Malaysia Translation Of Headnotes]

- f** Ini adalah rayuan daripada keputusan Mahkamah Rayuan yang mengikrarkan keputusan Mahkamah Tinggi yang mensabitkan perayu di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan menjatuhkan hukuman mati keatasnya kerana mengedarkan 251.06g kanabis. Mahkamah Rayuan telah memutuskan bahawa hakim perbicaraan wajar dalam memutuskan bahawa perayu memiliki kanabis dan dengan itu telah bertindak dengan betul dalam menggunakan tanggapan mengedar di bawah s. 37(da) Akta tersebut terhadap beliau. Di hadapan mahkamah semasa,
- g** perayu berhujah bahawa hakim perbicaraan telah tersalah pertimbangan dalam menggunakan tanggapan mengedar (s. 37(da)) berdasarkan tanggapan berkanun pemilikan (s. 37(d)) yang mana beliau telah pada awalnya gunakan berdasarkan keputusan beliau bahawa perayu mempunyai dalam jagaan dan kawalannya kanabis tersebut. Ianya juga diujahkan bahawa
- h** tanggapan mengedar (s. 37(da)) tidak boleh digunakan dalam ketiadaan keputusan faktual yang nyata dan mengiakan pemilikan sebenar.

i

Diputuskan:**Oleh Chong Siew Fai HB (Sabah & Sarawak)**

[1a] Tanggapan pemilikan di bawah s. 37(d) Akta tersebut tidak boleh diharapkan untuk menggunakan selanjutnya tanggapan mengedar di bawah s. 37(da) Akta tersebut.

[1b] Ianya pasti betul dan wajar jika hakim perbicaraan telah menggunakan tanggapan mengedar di bawah s. 37(da) Akta tersebut berdasarkan keputusan beliau bahawa perayu sebenarnya mempunyai di dalam milikannya kanabis tersebut, jika beliau telah pada awalnya membuat keputusan nyata yang sedemikian. Walaubagaimanapun, ianya kelihatan bahawa hakim perbicaraan tersebut telah juga mendapati perayu mempunyai jagaan dan kawalan kanabis tersebut dan, berdasarkan keputusan itu, menggunakan tanggapan pemilikan (s. 37(d)) terhadap beliau. Dan, berdasarkan tanggapan milikan berkanun ini (s. 37(d)), hakim perbicaraan menggunakan tanggapan mengedar (s. 37(da)) terhadap perayu.

[1c] Hakim perbicaraan telah tersalah arah dirinya sendiri secara serius ketika beliau membuat keputusan pemilikan sebenar dan pada masa yang sama, menggunakan tanggapan pemilikan berkanun di bawah s. 37(d) Akta tersebut. Terdapat keraguan yang teramat sangat mengenai samada beliau membuat keputusan pemilikan sebenar atau telah bergantung pada tanggapan pemilikan (s. 37(d)), dan kepada yang mana daripada kedua-dua tersebut penggunaan tanggapan mengedar (s. 37(da)) terhadap perayu telah diasaskan.

[Rayuan dibenarkan; sabitan dibatalkan dan hukuman mati diketepikan; digantikan dengan sabitan di bawah s. 6 Akta tersebut dan 10 tahun pemenjaraan ditambah 10 sebatan rotan.]

Case(s) referred to:

Mat v. PP [1963] MLJ 263 (**refd**)

Mohd Said Samad v. PP [1998] 2 CLJ 161 (**refd**)

Muhammed Hassan v. PP [1998] 2 CLJ 170 (**refd**)

Tunde Aptira & Ors v. PP (Federal Court; Criminal Appeal No: 05-6-97) (**refd**)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da)(vi), 39B(1)(a)

For the appellant - Collin Sequerah; M/s Zain & Co

For the respondent - Muniandy Karuyappan DPP

[Appeal from Court of Appeal, Kuala Lumpur; No: B05-6-1996]

Reported by Gan Peng Chiang

*a***JUDGMENT****Chong Siew Fai CJ (Sabah & Sarawak):**

b On 26 October 1999 we heard and allowed the appeal of the appellant, quashed the conviction (trafficking 251.06 grammes of cannabis) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (hereinafter referred to as “the Act”) and set aside the death sentence, overruling both the learned trial judge and the Court of Appeal, and substituted therefor a conviction for possession under s. 6 of the Act and sentenced him to ten years’ imprisonment with effect from 6 September 1993 (the date of his arrest) and ten strokes of the rotan. We indicated that grounds for the decision would be given later. These we now give.

c

In the High Court, the charge, as amended, against the appellant was as follows:

d

Bahawa kamu pada 6.9.1993 jam lebih kurang 8.10 pagi disebuah rumah kedai No. 2, Kampung Pinang Tunggal, Bt 6 1/2 Jalan Klang Lama, dalam Daerah Petaling Jaya, dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu jenis cannabis seberat 251.06 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

e

The amended charge may be translated into English thus:

f

That you on 6.9.1993 at about 8.10 am. at shophouse No. 2, Kampung Pinang Tunggal, 6 1/2 mile, Klang Lama Road, Petaling Jaya, Selangor Darul Ehsan, had trafficked in dangerous drug, to wit, 251.06 grammes of cannabis, and you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act.

Case For The Prosecution*g*

Acting on information received, PW3, ASP Lau Kam Chee assembled a team of police officers and raided shophouse No. 2, Kampung Pinang Tunggal, 6 1/2 Mile, Jalan Klang Lama, Petaling Jaya, Selangor. The police party broke up into two groups PW6, Lance Corporal Abdul Ghaffar bin Haji Tahir, and two other policemen were entrusted to guard the back portion of the shophouse whilst PW3 and his men proceeded to the front of the shophouse. PW3 then entered the shophouse and straightaway arrested an Indonesian man named Ismail bin Mohamad found therein. Meanwhile, whilst proceeding to his assigned position, PW6 peered inside a makeshift and roofless bathroom outside the shophouse and saw the appellant in the process of rolling ganja and sitting cross-legged with an aluminium pot containing ganja leaves on his lap. Upon seeing PW6, the

i

appellant immediately got up and ran inside the shophouse. He then ran out again and crashed through the bathroom wall outside with PW6 in hot pursuit. The appellant was eventually cornered and arrested by PW6 with the assistance of PW9, Lance Corporal Rahim bin Md. Diah. A search was conducted of the bathroom in which a package containing 600 rolls of ganja was found in one corner and another package containing a slab of ganja was recovered under a lamp. The drugs were analysed by a government chemist PW7, Chan Kee Bian, who confirmed that the materials were cannabis as defined in s. 2 of the Act with a combined weight of 549.36 grammes. It would, however, be pertinent to mention here that at the close of the case for the prosecution, the learned trial judge found that the slab of cannabis recovered under the lamp, weighing 298.3 grammes was not in the appellant's possession. Accordingly, the weight of the cannabis in the charge was amended to 251.06 grammes. There was no appeal in respect of this finding.

As regards the amended balance of 251.06 grammes, the learned trial judge found sufficient evidence showing that the appellant had custody and control of the same. He then invoked the presumptions of possession and of trafficking under s. 37(d) and 37(da)(vi) of the Act. (ie, presumption upon presumption) against the appellant, who was called to enter on his defence.

The Defence

The defence of the appellant consisted solely of his own sworn testimony. The appellant denied being in possession of the incriminating cannabis found in the bathroom and further denied rolling cannabis when PW6 saw him as testified by the latter. His explanation of being in the bathroom was to answer a call of nature, and his reasoning for fleeing upon seeing the policemen in the shophouse was that his friend (one Ismail) who had already been arrested in the house, told him to run. The learned trial judge acknowledged that although the appellant's defence was one of bare denial, on the authority of *Mat v. PP* [1963] MLJ 263 he was nevertheless legally bound to consider if the defence put forward was capable of raising a reasonable doubt on the prosecution's case.

High Court

After evaluating the testimony of the appellant, the learned trial judge found on balance of probabilities that the appellant had failed to raise any reasonable doubt on the prosecution's case and had also failed to rebut the two statutory presumptions invoked by him earlier. The learned trial judge concluded that from the totality of the evidence adduced, it was clear that the appellant was trafficking 251.06 grammes of cannabis as there was no

- a* evidence suggesting that the cannabis was for his own use. Accordingly, the learned trial judge entered a conviction against the appellant for trafficking and sentenced him to death. Against the conviction and the sentence the appellant appealed to the Court of Appeal.

b ***Court Of Appeal***

- Before the Court of Appeal, it was submitted on behalf of the appellant that the conviction and the sentence were bad and unsustainable by reason that the learned trial judge had erred in invoking presumption upon presumption referred to earlier on the mere finding that the appellant had custody and control of the said cannabis. *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 and *Mohd. Said Samad v. PP* [1998] 2 CLJ 161, were cited in support of the contention.

- The Court of Appeal, however, reviewed, *inter alia*, the testimony of PW6, the eye witness, who saw the appellant alone in the bathroom rolling the ganja leaves and fleeing upon noting the presence of the police in the shophouse, and agreed with the deputy public prosecutor that the learned trial judge was justified in concluding that the appellant was in possession of the cannabis and had correctly invoked the presumption of trafficking under the Act. They also concurred with the deputy public prosecutor that
- d* the learned trial judge had not contravened any part of the two Federal Court decisions cited above. The conviction and the sentence were affirmed.
- e*

Federal Court

- Before us, the sole issue was the invocation of presumption upon presumption. Relying on *Muhammed bin Hassan*, *supra*. Counsel for the appellant submitted that the learned trial judge had erred in invoking the double presumptions. Though conceding that there has been a finding of the appellant being in custody and control of the 251.06 grammes of ganja, counsel contended that the learned final judge had seriously misdirected himself by invoking the presumption of possession under s. 37(d) of the Act. It was also argued that since there had been no finding of actual possession of ganja, the presumption of trafficking under s. 37(da) could not be invoked.
- f*
- g*
- h* *Muhammed bin Hassan*, *supra*, which counsel for both sides informed us that it had been affirmed by this court comprising of a panel of five judges in *Tunde Aptira & 2 Other v. Pendakwa Raya* Federal Court Criminal Appeal No. 05-6-97, decided in essence, so far as is relevant to this case, that a presumed possession under s. 37(d) of the Act could not be based to invoke the presumption of trafficking under s. 37(da) thereof, and that
- i*

to arrive at the presumption of trafficking under s. 37(da), an express, affirmative finding of possession as understood in criminal law, based on evidence, is necessary.

For the respondent, the learned deputy public prosecutor, whilst pointing out that the learned trial judge had found possession, conceded that the learned trial judge had, in his judgment, also relied on s. 37(d) (presumed possession) to invoke s. 37(da) (presumed trafficking).

Having considered the evidence adduced and the submissions of counsel for both sides, we unanimously allowed the appeal as aforesaid. The ratio decided in *Muhammed bin Hassan, supra* is clear. One cannot rely on the presumption of possession under s. 37(d) to invoke a further presumption of trafficking under s. 37(da) of the Act. In the instant case under appeal, the learned trial judge held that the appellant was in possession of 251.06 grammes of cannabis. It would have been in order if, based on the express finding of possession, he proceeded to invoke the presumption of trafficking under s. 37(da). But this was not what he did. Immediately thereafter, he found the appellant in custody and control of the cannabis and held that therefore the presumption of possession under s. 37(d) applied. He then went on to say that likewise because the accused was in possession of more than 200 grammes of cannabis, the presumption of trafficking under s. 37(da)(vi) applied. Towards the conclusion of his judgment, the learned trial judge said, *inter alia*, that the appellant had failed to rebut the statutory presumptions under s. 37(d) (presumed possession) and s. 37(da)(vi) (presumed trafficking) of the Act. By making a finding of possession and then relying on the provision of presumed possession under s. 37(d), the learned trial judge had seriously misdirected himself and leaves us in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s. 37(d). The benefit of doubt ought, in our view, be given to the appellant.

For the above reasons, we came to the conclusion as set out at the commencement of this grounds of judgment.

*a**b**c**d**e**f**g**h**i*